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IN THE

Supreme Court of the United States

October Term, 1959

No. 21[illegible]

TRADERS OIL COMPANY OF HOUSTON, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI
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Traders Oil Company of Houston prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in *National Labor Relations Board v. Traders Oil Company of Houston* on February 13, 1959 and the order of such court denying the petition for rehearing therein entered on April 22, 1959, and the decrees therein dated February 13 and May 13, 1959.

Opinions Below

The opinion and order of the National Labor Relations Board are printed at pages 132-152 of the Transcript of

the Record as printed for the use of the court below, of which nine copies have been filed with this petition. They are reported in 119 NLRB 746 et seq. The opinion of the Court of Appeals for the Fifth Circuit dated February 13, 1959 and the opinion on petition for rehearing dated April 22, 1959 are printed at page 25 of the appendix hereto. They are reported at 263 F. 2d 835. The decrees of February 13, 1959 and May 13, 1959 are printed at pages 25-26 of the appendix hereto, and are unreported.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit is dated February 13, 1959 and was entered on February 13, 1959. Petition for rehearing, timely filed on March 4, 1959, was denied April 22, 1959 by order of such date entered on such date. An enforcement decree was dated and entered on May 13, 1959. (R. 154, 156, 157, 206, 207, Appendix B, page 25 et seq.)

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1), and 29 U.S.C. Sec. 160 (e).

Questions Presented

1. Whether a finding that petitioner refused to bargain with Local 4-227 is properly predicated on petitioner's having undertaken to bargain with such Union and to request contract proposals without first having entered into an agreement with such Union that it would not question its representative status after its bargaining demands were disclosed.

2. Whether there is otherwise substantial evidence on the record considered as a whole to support a finding of a refusal to bargain on the part of petitioner.

3. Whether an order now to bargain with Local 4-227 would be an appropriate remedy to correct a prior refusal to bargain with such Union where, after such unfair labor practice was well known to such Union, it nevertheless agreed to a consent election to determine and establish its bargaining status (which election it thereafter lost).

4. Whether it is an appropriate remedy to suspend the right of the employees to choose not to be represented by such Union where the evidence establishes without contradiction that such choice was a result of extremes of utterance by certain Union advocates and had no connection with any unfair labor practices found to have been committed by petitioner.

5. Whether the Board properly excluded evidence as to whether the employees had undertaken to change their bargaining representative prior to the Board's hearing for reasons unrelated to any asserted unfair labor practice, which evidence directly related to what would constitute an appropriate remedy.

6. Whether the order sufficiently informs petitioner what petitioner is to do on penalty of contempt, particularly as to how petitioner is to give effect to the direction not to interfere with exercise by the employees of the right to choose a different representative under Section 7 and whose "request" to bargain with such Union it is to comply with.

7. Whether it is an appropriate remedy to order petitioner to post notices directed to the employees stating that petitioner will "on request" bargain with Local 4-227 and will not interfere with their rights under Section 7, which they are bound to understand as referring to a re-

quest of the adressees of such notice and as recognizing a present right in them to choose a different representative if the intent of the Board order is that a request by the Union is intended irrespective of any different request or selection by the employees until some future date when a contract or impasse has reasonably been reached with the Union.

8. Whether the finding that petitioner violated Section 8 (a) (1) of the Act has substantial evidence on the record considered as a whole to support it.

9. Whether the ruling that Lambdin's speech constituted an improper inducement is a denial of his right of free speech under Section 8 (c) of the *National Labor Relations Act* and the *First Amendment to the United States Constitution*.

Constitutional and Statutory Provisions Involved

This is an enforcement proceeding under the National Labor Relations Act as amended by the Labor Management Relations Act, 1947, as amended, 61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S. Code Sections 141-187, particularly Sections 7, 8 (a) (1), 8 (a) (5), 8 (c), 8 (d), and 10 (e) as the pertinent provisions thereof, which are printed in Appendix A, page 21, infra, together with the First Amendment to the Constitution of the United States.

Statement of the Case

The basis for Federal jurisdiction in the court of first instance is that petitioner is engaged in interstate commerce, and in activities affecting commerce (R. 48, 53, 54, 1, 2).

In April, 1956, Local 4-227, Oil, Chemical and Atomic Workers International Union, AFL-CIO, while in fact holding authorization cards from a majority of the employees in a proposed unit (R. 133), requested of petitioner and was granted a bargaining appointment at which appropriate representatives of the company and union were present (P.A. 22-25).[1] A discussion was entered into involving various questions relating to wages, hours, and conditions of employment, and the company's financial situation (P.A. 25, 26). The company asked for contract proposals. The Union declined to give any (P.A. 44). A majority of the Board held that this was not an acceptance by petitioner of the bargaining request because the company had not agreed not to question the Union's representative status after disclosure of its bargaining demands was made (R. 139). There is no evidence that the company had in any way qualified the company's recognition for bargaining (P.A. 22-26, 43-45). The Union, however, on its own initiative, had expressed a willingness to submit the cards to some third party, though not as a result of any challenge or request by employer (P.A. 22, 23). While refusing to go foward with the bargaining, the Union again proposed that the cards be so submitted, or else that a consent election be had under Board auspices (P.A. 44, 28, 26). Petitioner's representative, faced with this refusal to bargain and with this proposal for a demonstration of majority status, did admit of a personal opinion (so understood and characterized by the Union representative (P.A. 28), that the Union did not represent a majority and did accept the offer to

[1]Since the appendices below are filed herewith, pursuant to Rule 21, and they are headed and certified as designated below, P.A. will still be used here for the Appendix filed by the Board as petitioner below, and A.R. will designate the Appendix filed by Traders Oil Company of Houston as Respondent below.

proceed with the desired demonstration by a consent election agreement. The dissenting Board members challenged that the mere expression of a doubt without any insistence on proof as a condition to bargaining can under the Act be equated with a refusal to bargain (R. 145, 146). The parties entered into such agreement and the election was had. The Union lost, nine to nothing (P.A. 26, 37).

The Union, without requesting further bargaining, undertook to avoid the result of the election by filing unfair labor practice charges (R. 137), and on a hearing, petitioner was found to have refused to bargain, at the above described bargaining conference, and even by the initial telephone call by which petitioner agreed to such conference (R. 140), and petitioner was ordered to cease refusing to bargain with such Union and to bargain with it "upon request" (R. 141).

Petitioner was also found (R. 133) to have violated Section 8 (a) (1) of the Act because on April 6, when Union cards had been first signed, one of the signers, who was son of the company's field superintendent, went home and in a private conversation told his father about the signing, whereupon the father was said to have exclaimed that the employees had bumped or worked themselves out of a job (P.A. 93, A.R. 47), by which the witness stated he understood his father to mean the company was not financially able to go Union (P.A. 93), though the Board, disregarding the witness' stated understanding, has without any reasonable basis construed the statement to mean that the superintendent resolved to fire the employees, his son included (R. 139). One Board member dissented from the finding that this family conversation constituted an unfair labor practice (R. 133).

The Board also found petitioner guilty of coercion on a charge that its superintendent, Pearson, told a discharged employee, Borders, he would see the company never hired him again, after being told such employee had started "this mess" (R. 135). The Union was nowhere referred to (P.A. 83), and the "mess" in progress was an angry altercation provoked by such employee on the basis the superintendent had advance information from the company of the prospective discharges and had not shared it with the employees (P.A. 84). As the Board states there is no contention the layoffs were discriminatory (R. 135), the position seems to be that the company was discharging Borders without regard to any Union activity but that the superintendent in the course of his employment was then telling him they would decline to rehire him because of Union activity. As with Pearson, Jr., the Board has assumed the legal right to choose an improbable, illegal meaning in preference to a reasonable and probable legal meaning. The Board ordered the company to desist from violating Section 8 (a) (1). (R. 141)

The employees testified they were in no manner coerced (A.R. 38-40, 50; P.A. 124), and subsequent to the foregoing had signed new cards on May 1 reaffirming Union membership (R. 147), but in the aftermath of the May 1 Union meeting statements there made convinced three employee members that the prime Union advocates were motivated by spite for the company, and these three, who with the two that had never joined the Union (P.A. 47, 17, 18, 142-161, 75) made a majority, did not think that a grudge should be settled that way and decided they did not want the Union thereafter (P.A. 112, 130-131, 136, 137). With this decision the employer had

no connection whatever. Others, learning of the forthcoming voting opportunity, also decided they did not want the Union (P.A. 69, 97, A.R. 36), and the employees, acting on their own initiative and without the knowledge of the employer, prepared a contract proposal of their own and presented it to the employer on the morning of May 15 (A.R. 33-35, 48, 49; P.A. 57, 67-69, 97, 98, 114-120, 130). The Board assumes that this agreement bestowed an economic benefit. There is in fact no testimony whatever that it contained anything that was not already established company policy. The employer acknowledged his assent to its provisions and signed a copy. It was signed by some of the employees before and by the remainder after the election was held on that same day (P.A. 96). No discussion whatever as to how the employees should vote was ever had in this connection (P.A. 67, 97, 114, 130; A.R. 34, 35). The Board found that this contract constituted an improper inducement and grant of benefits and ordered that it be not observed (R. 137, 141). It had, however, expired by its terms before the Board's order (P.A. 165, paragraph 14), and no steps had been taken to renew it.

Remarks made by Lambdin the day before the election that he was interested in having the gripes and grievances straightened out and that how the men voted on the Union was entirely up to them (P.A. 49, 124, 131) were also held to be an improper inducement (R. 137).

The employees, learning of the new labor charges, asked the local labor office how to get out of the Union, were told to, and did, write a letter of withdrawal, but it was rejected at the hearing (P.A. 69, 70, 99-101; A.R. 73, 65-68; R. 88). The two employees cited answered

at the hearing that the employees had withdrawn from the Union and it did not represent a majority (R. 66, 67). After the Board entered its order, the employees gave a further written notice to the employer that they did not wish to be represented by such Union (R. 12).

Being told by the Board's enforcement officer that it was employer's duty to do so notwithstanding these notifications, petitioner undertook to bargain with such Union and held a number of contract discussions. The employees gave the Union no participation in these negotiations. The Union discontinued such bargaining and shortly thereafter this enforcement proceeding was instituted. The same questions presented here, and others, were presented to the Court of Appeals for the Fifth Circuit, but the Court, without discussion, affirmed the Board's findings and rulings and ordered enforcement.

Reasons For Granting the Writ

Daily, employers are asked to bargain by Unions that have not been certified but assert an authorization from a majority of the employees. It is to the public interest that an employer's duties in this standard situation shall be clear and also that a minimum of formalities and impediments shall be interposed in the collective bargaining process. If the opinions in this case are allowed to stand, a new preliminary duty has been placed on employers and there is a new impediment to bargaining.

Petitioner made the requested bargaining appointment (P.A. 22-25), met with the Union's bargaining representatives and entered upon a discussion of wages, hours, and working conditions (P.A. 25, 26). It then asked for contract proposals but was rebuffed by the Union (P.A.

44). The reason petitioner didn't bargain was because the Union wouldn't. In this situation, the Board and Court have predicated a finding of a refusal by petitioner to bargain upon the following, quoted from the majority Board opinion:

> "The Respondent's request for a proposed contract in the absence of an agreement to recognize the Union was not an acceptance of the bargaining request. Under the circumstances of this case we find that it was a request that the Union disclose its bargaining demands while at the same time reserving to the Respondent the right to question the Union's representative status after such disclosure had been made." (R. 139)

Two Board members dissented (R. 143-150). The Court, without discussion, approved the holding (Appendix B, p. 25, infra).

This is wholly out of keeping with the position taken by this court in *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 78 S. Ct. 718, that representative status is settled by operation of law, about which bargaining is not to be demanded.

Recognition is properly and legally bestowed by undertaking to negotiate with the Union, and whatever the legal effect of recognition may be, no right is reserved by the employer by not having first contracted not to question the Union's representative status after its bargaining demands are disclosed. If recognition of an uncertified Union will commit the employees to that Union, and take away from the employees the right under Section 7 to have the employer respect a change of selection until such

bargaining has run its course to contract or impasse, that will be an effect imposed by law and should not be presented by the Board and Court as the fruit of such a preliminary contract. Protection to the Union in its disclosure of its bargaining demands is not the employer's to bestow or withhold.

We do not, however, know of any holding by this court that recognition of an uncertified Union does thus suspend a right of change on the part of the employees, and should this court consider that to be its effect, it should take jurisdiction to so declare. In footnote 9 to the opinion in *Brooks v. N.L.R.B.*, 348 U.S. 96, 102, 75 S. Ct. 176, 180, this court makes reference to *N.L.R.B. v. Mayer*, 196 F. 2d 286, in this connection, wherein the Fifth Circuit, citing *N.L.R.B. v. Hollywood-Maxwell Co.*, 126 F. 2d 815 (CA 9), held that an employer should cease to recognize and bargain with an uncertified Union where the employees, during negotiations, change their selection. The National Labor Relations Board in Squirrel Brand Co., Inc., 104 NLRB 289, also considered that the employer should give effect to a change in designation by the employees, once a refusal to bargain at a time when the uncertified Union did have a majority had been rectified. In the present case, when the Union demanded such protective agreement, the employer had not refused to bargain and was undertaking to do so. If, as the Board in the *Squirrel Brand* case and the Fifth Circuit in the *Mayer* case say, the employees retain the right pursuant to Section 7, to change their bargaining representative notwithstanding the employer's recognition of an uncertified Union which had a majority at the time of recognition, so long as the employer had not refused to bargain with it

while it was designated, and retain the right to have the employer respect such new choice, then the protection which the Union demanded here was not the employer's to give, and such a preliminary contract, if made, would have been an illegal contract, and failure to make same, and the attempt to bargain without having made same cannot in law have constituted a refusal to bargain.

There was no showing at the hearing that the petitioner had at any time thereafter been asked to bargain or had refused to do so.

The dissenting Board members are clearly right in saying that Lambdin's admission of a "personal" doubt could not be equated with a refusal to bargain, since he had in no way interposed it or required that the Union prove its majority, and such demonstration was entirely the interjection and proposal of the Union (R. 145, 146, P.A. 22-28, 43-45). It would be an entrapment to make his acceptance of the consent election offer an unfair labor practice under such circumstances.

There is no other evidence on which the finding of a refusal to bargain could be sustained.

The dissenting Board members would also apply the principle of Aiello Dairy Farms, 110 NLRB 1365 (R. 148). If petitioner had thus committed an unfair labor practice in its handling of the bargaining, the Union certainly knew it when it agreed to the consent election to be held under the Board's auspices. It would dishonor and discredit the Board's elections if the Union is put in the position of being able to emerge victorious if it gets the high vote of being able to avoid the result if it gets the high vote but of being able to avoid the result

it agreed to the election constituted an unfair labor practice in violation of Section 8(a)(5), i.e., it can win but can't lose. The Board correctly ruled against entertaining such a charge after the Union lost the election in Aiello Dairy Farms, but the Board majority and the Court have ignored that salutary principle here. It is proper matter for judicial review, however, whether the Board may merely apply such rule as and when it chooses, or is itself bound by it, upon a court review of the appropriateness of the remedies to effectuate the policies of the Act. We have not found where this court has passed upon the principle of the Aiello Dairy Farms, and submit that it is to the public interest for this court to do so. We further submit that in ignoring rather than overruling the doctrine, and apparently reserving the right to apply it to other litigants, the majority deprive this petitioner of equal treatment and of due process.

Since there is no basis for holding that petitioner ever refused to bargain, there was also no basis for the consideration of the supposed 8(a)(1) violations for the purpose of determining whether or not petitioner's vice-president Lambdin reasonably and in good faith entertained a doubt of the Union majority. One is privileged to entertain an unreasonable doubt, if he is not interposing it or requiring that it be satisfied before entering upon collective bargaining.

The Statement of the Case shows, however, that the 8(a)(1) findings were without substantial evidence on the record considered as a whole to support them, and also that in construing his remarks on the day before the election as an unfair labor practice, Lambdin has been denied his constitutional and statutory rights of free speech.

As we understand the holding in *N.L.R.B. v. Warren Company*, 350 U.S. 107, 76 S. Ct. 185, it is within the province of the Board and Court to suspend the right of the employees under Section 7 to change their bargaining representative, even where there has been no certification, at least where there has been a refusal to bargain until such refusal has been corrected by good faith bargaining. The appropriateness of this remedy, however, was not an open question in the *Warren* case. The Statement of the Case supra shows that on the special facts of this case such a suspension should have been held as a matter of law not to be an appropriate remedy because the employees freely signed new Union cards on May 1 after the supposed matters of coercion, and their then abandonment of the Union is fully accounted for by their reaction to the grudge speeches they thereafter heard at the Union meeting for which the employer was in no way responsible. Of broad interest and application, however, is the question whether the Board can properly refuse to so much as receive evidence as to what representation the employees want, in determining what is the appropriate remedy. This court held in *N.L.R.B. v. Indiana and Michigan Electric Co.*, 318 U.S. 9, 28, 63 S. Ct. 394, 405, that "findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed." The Board has nevertheless sustained the trial examiner in excluding the evidence of the employees' efforts to withdraw from the Union (R. 88, A.R. 60, 61, 69-70, 73). We submit that the Board is no more entitled to exclude proffered evidence of what is an appropriate remedy in the case than it is to exclude evidence bearing on whether there was an unfair labor practice in the case. We believe this question

transcends the particularities of our case and is a pertinent question to many Board proceedings. It is not of interest to the employees alone. They can migrate to other jobs where rights of choice under Section 7 have not been circumscribed. The order stays with the employer. It does not follow the employee. Employers have a legitimate interest in keeping their employees.

Neither is it simply to be taken for granted that the Board by its order in the present case meant to suspend any right of the employees to change their bargaining representative until bargaining with Local 4-227 had been carried to contract or impasse. If that is the intent, it should be fairly reflected by the order.

Here, also, we believe the form of order used is not peculiar to this case and that the questions raised are of general application.

Paragraph 2 (a) directs petitioner to bargain collectively with Local 4-227 "upon request" but does not say whose request, and leaves it to the employer to determine when a request by the Union is determinative and when a request by the employees is requisite. With reference to this, employer is directed by paragraph 1(d) not in any manner to interfere with, restrain or coerce the employees in the exercise of the rights guaranteed by Section 7 of the Act, which, of course, guarantees them a right of choice with respect to their bargaining representative. Paragraph 1(d) is additional to and distinct from paragraphs 1(a) and 1(b) to cease and desist from threatening the employees or promising benefits to discourage Union activity. It is obvious that the employer cannot at the same time bargain with Local 4-227 at the Union's request and recognize

the right of the employees to choose not to be represented by such Union, as they are undertaking to choose here. If the latter right of choice is suspended, it would be a simple matter for the Board to have stated that such was the case and over what period or in what circumstances petitioner was to disregard attempted exercise of rights by the employees to make a different selection. As the order stands, paragraph 1(d) appears to recognize a present right to select a different representative and to imply that employer must determine at peril of contempt whether a "request" is consistent with an unsuspended right of free selection on the part of the employees under Section 7.

This is not the clear definition of what petitioner should do that this court said petitioner was entitled to in *J. I. Case Company v. N.L.R.B.*, 321 U.S. 332, 341. Moreover, a general direction to comply with Section 7, on peril of contempt, was held by this court to be an improper order in *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 61 S. Ct. 693.

If petitioner construed this order to direct bargaining on the Union's request in disregard of a contrary request by the employees and the Board elected to construe it otherwise, there is no single provision to which petitioner could point in defense of its interpretation.

The Board itself does not regard an order of this nature as terminating the employee's right to make a different selection until the Board itself shall order otherwise. The responsibility is still cast on the employer, without benefit of further Board direction, from such time as the previous failure to bargain in good faith shall have been corrected; under the Board's holding in *Squirrel Brand Co., Inc.*, 104

NLRB 289. From that point, at least, we are ordered to observe all rights of the employees under Section 7, at peril of contempt.

Neither, under the Board's holding in the *Squirrel Brand* case, do we know whether, once there has been such good faith bargaining that we were ready to sign a contract with the Union, the Union's request would still be the one that we were to honor, or whether at that point, under 1 (d) of the order a contrary request by the employees would become controlling, i.e., whether if notwithstanding our rectifying any previous failure to bargain the employees still no longer wanted the Union, we should nevertheless sign the contract, our readiness to sign which then demonstrated our good faith, or whether at that point, the previous refusal to bargain in good faith having been corrected, the Union's request would no longer be controlling and we should then regard the employees' request as dominant.

If the purpose is to restore the status quo, then as the employees would have had a right to change their representative during an initial bargaining in good faith, is it just to be assumed that the Board means to deprive them of like status after good faith bargaining is in progress?

We must seek clarification as to our duties under the injunction from this court because the court below has turned a deaf ear to our request for a clear direction (R. 158-168).

The question with reference to the Board's form of notice is also of general application. A notice directed to the employees stating that we will respect their rights under Section 7 and bargain with the Union upon request is bound to be understood by them as the request of the ad-

dressees of such notice and cause them to feel that they have a present right not to make such request and to change their representative under Section 7. The employer is thus ordered in effect to tell them that they have a right and that he will respect a right which the Board has in fact ordered him not to respect. This procedure is worse than a useless fiction. It in fact compels that the employer offer what the Board orders it shall not give.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

H. FLETCHER BROWN
825 Esperson Building
Houston 2, Texas
Attorney for Petitioner

Certificate and Proof of Service

I, H. Fletcher Brown, attorney for Traders Oil Company of Houston, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the fifteenth day of July, 1959, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto and to this proceeding, as follows:

1. On the United States, and on the National Labor Relations Board, an agency thereof, by depositing in the United States Post Office at Houston, Texas, and mailing three copies thereof in a duly addressed

envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the National Labor Relations Board, by depositing in the United States Post Office at Houston, Texas, and mailing copies thereof in duly addressed envelopes, with air mail postage prepaid, to Thomas J. McDermott, Esquire, its Associate General Counsel, and Melvin J. Welles, Esquire, its attorneys of record who represented the National Labor Relations Board in the court whose judgment and decree are sought to be reviewed, at the offices of the National Labor Relations Board, Washington 25, D. C.

and certify that I also served same

on Local 4-227, Oil, Chemical and Atomic Workers International Union, AFL-CIO, by depositing in the United State Post Office at Houston, Texas, and mailing a copy thereof in a duly addressed envelope, with first class postage prepaid, to said Local 4-227, Oil, Chemical and Atomic Workers International Union, AFL-CIO, at 2306 Broadway, Houston, Texas, its post office address; and

on Employee Committee by depositing in the United States Post Office at Houston, Texas, and mailing a copy thereof in a duly addressed envelope, with first class postage prepaid, to said Employee Committee, at P. O. Box 296, Humble, Texas, its post office address,

which have not appeared as parties herein and are not represented by any attorney herein.

H. Fletcher Brown, attorney for
Petitioner, Traders Oil Company
of Houston
825 Esperson Building, Houston, Texas

APPENDIX A

Constitutional Provision:

United States Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statutory Provisions:

The National Labor Relations Act, as amended by Labor Management Relations Act, 1947, as amended, 61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Sec. 141-187.

The pertinent provisions are

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession; * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. * * * :

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board

with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

APPENDIX B

THE OPINIONS BELOW

February 13, 1959

Before RIVES, CAMERON and WISDOM, Circuit Judges.

PER CURIAM: We find that the holdings of the Labor Board that Respondent unlawfully interfered with the self-organizational rights of its employees in violation of Section 8 (a) (1) of the Act and that it refused to recognize and bargain with the Union in violation of Section 8 (a) (5) of the Act are each supported by substanial evidence on the record as a whole.

The facts fully appear in the decision of the Board and need not be here repeated.

The order of the Board is ENFORCED.

ON PETITION FOR REHEARING

April 22, 1959

Before RIVES, CAMERON and WISDOM, Circuit Judges.

PER CURIAM: Our original decision found that the holdings of the Labor Board are each supported by substantial evidence on the record as a whole. We agree also with the rulings and conclusions of law as expressed by the majority members of the Board, and that the relief granted in the Board's order is appropriate. The petition for rehearing is therefore DENIED.

JUDGMENT OF THE COURT BELOW

Extact from the Minutes of February 13, 1959

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an

order of the National Labor Relations Board made on December 13, 1957, in the proceedings known upon the records of the Board as Case No. 39-CA-564, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the said National Labor Relations Board in this cause be, and the same is hereby, enforced.

DECREE

Entered May 13, 1959

Before RIVES, CAMERON and WISDOM, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on December 13, 1957. The Court heard argument of respective counsel on February 2, 1959, and has considered the briefs and transcript of record filed in this cause. On February 13, 1959, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be, and the same is hereby enforced; and that said Traders Oil Company of Houston, and its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

(R. 153-207)

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 216

TRADERS OIL COMPANY OF HOUSTON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 25) is reported at 263 F. 2d 835. The Board's Decision and Order (R. 132–152)[1] are reported at 119 NLRB 746.

JURISDICTION

The decision of the court below was entered on February 13, 1959, and a petition for rehearing was denied April 22, 1959. The petition for a writ of certiorari

[1] "R" references are to portions of the Transcript of Record printed pursuant to the rules of the court below as Volume I. "P.A." references are to portions of the testimony and exhibits printed as an appendix to the Board's brief below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

was filed on July 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that petitioner refused to bargain collectively with the Union, chosen by a majority of its employees, in violation of Section 8(a) (5) and (1) of the National Labor Relations Act.

2. Whether the Board's remedial order directing petitioner to bargain collectively with the Union is proper and valid.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 21–22 of the Petition.

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

On April 6, 1956, a group of petitioner's employees working at its Humble Field drilling lease met with L. Tom Fox, secretary-treasurer of the Union [2] (R. 79, 133; P.A. 11, 15–20, 73–75, 141, 167). At this meeting, all 13 non-supervisory employees present, who constituted a majority of the production and maintenance employees at the Humble Field lease, signed application cards for union membership and authorized the Union to bargain for them with petitioner

[2] Local 4–227, Oil, Chemical and Atomic Workers International Union, AFL–CIO.

(R. 79, 133; P.A. 15–20, 142–152, 154). Later that day, employee R. E. Pearson, Jr., told his father, Field Superintendent Pearson, "We all had joined the Union." Whereupon Superintendent Pearson replied, "Well, looks like you all bumped yourselves out of a job" (R. 86–87, 133; P.A. 11, 92–93).

Around April 10, another employee signed a union application and authorization card, thus further increasing the Union's majority among the non-supervisory employees at the Humble Field lease for purposes of collective bargaining (R. 75, n. 4, 79, n. 7, 80, n. 8, 94, 133, 134; P.A. 16–17, 19, 71, 142–152, 154–155, 167).

On April 13, Union Secretary Fox informed petitioner's vice-president, S. D. Lambdin, that the Union represented a majority of petitioner's employees at the Humble Field lease, that it wished to bargain collectively, and that the Union was willing to prove its majority through an impartial third party. Lambdin replied that he would have to consult his lawyer, and would contact Fox later (R. 79, 93–94, 134; P.A. 8, 21–23, 39–40).

The next working day, Monday, April 16, petitioner, for reasons unrelated to this proceeding, laid off eight of the non-supervisory employees who had designated the Union (R. 80, 135; P.A. 28–29, 78–79). This still left the Union with a majority in the unit requested (R. 135; P.A. 142–144, 149, 155, 167). Later the same day, when employee Wilbur M. Borders protested the layoffs to Superintendent Pearson, the latter, in the presence of five of the other laid-off employees, replied, "Well, who started this mess [re-

ferring to the Union] anyway?" When Borders admitted that he had, Pearson stated "he would see that [Borders] never worked for Traders Oil Company as long as he was superintendent out there" (R. 86, 135; P.A. 84–91).

On April 25, at a meeting between representatives of the Union and petitioner, Union Secretary Fox again requested petitioner's Vice-President Lambdin to bargain on the terms of a contract (R. 79–80, 135; P.A. 24–26, 39). When Lambdin asked Fox to let him see the proposed contract, Fox indicated to Lambdin that it would not be feasible to do so until petitioner agreed to recognize and bargain with the Union (R. 135–136; P.A. 44). Lambdin then questioned the Union's majority status, and Fox offered to prove its majority either through a check of the Union's cards by an impartial third party or a Board election (R. 79–80, 135–136; P.A. 26, 28). A consent election agreement was later signed on May 7, and the election scheduled for May 15 (R. 80, 136; P.A. 44–45, 170–174).

Meanwhile, among the non-supervisory employees who were still employed by petitioner, on May 1 the Union obtained newly-executed cards from five of the employees who had previously designated the Union to represent them (R. 80; P.A. 20, 29–34, 47, 156, 158–161). Added to the card of another employee who had previously executed such a designation, this gave the Union authorization cards from six of the seven employees in the unit (P.A. 137–138, 149, 167).

Shortly before the scheduled election, Vice-President Lambdin told a meeting of the employees that,

whatever their "gripes" and grievances were, he wanted to "straighten it out with them," and later added "that whatever he told the men he would do he was willing to put it in writing" (R. 81, 96–97, 136; P.A. 48–49, 58–60, 115–116, 122–125, 132–133). On May 14, the evening before the election, some of the employees met at the home of a supervisor where they drew up a contract in pencil to present to Lambdin, which all present signed (R. 81–82, 136–137; P.A. 50–51, 53, 55–56, 61, 65–66, 72–73, 95–96, 113–116).

The next morning, May 15, the day of the election, the contract that had been drawn up was presented by the employees to Lambdin who had it typed on petitioner's letterhead (R. 81, 84, 136–137; P.A. 53–56, 119–121, 162–165, 168–169). Later in the morning, but before the election, Lambdin signed the contract on behalf of petitioner and obtained the signatures of two employees who signed individually for themselves (R. 81, 137; P.A. 54–56, 62–66, 129–132). The election was subsequently held at 12:00 noon, the Union losing 9 to 0 (R. 80–81; P.A. 36–37, 58). After the election, Lambdin obtained the signatures of other employees on the contract and each employee was given a copy of the document which contained provisions for wages, sick leave, vacations, holidays and other terms and conditions of employment, but no clause recognizing any union (R. 82, 135, 137; P.A. 56, 95–96, 168–169).

Not until after the election did the Union learn that the employees had entered into this contract with petitioner (R. 85, 137; P.A. 37). Timely objections to conduct affecting the result of the election were filed

by the Union. These were sustained by the Regional Director, but later pursuant to the Union's request, the Board dismissed the representation petition in order to process the unfair labor practice charge based on petitioner's conduct (R. 85, n. 11, 137, n. 8, 48–54; P.A. 6–7).

On the basis of the foregoing, the Board found that petitioner violated Section 8(a)(1) of the Act by Superintendent Pearson's statements to employees R. E. Pearson, Jr. and Wilbur M. Borders, on April 6 and 16 respectively, threatening them with reprisal for engaging in union activities (R. 133, 135). The Board found that petitioner's offer through Vice-President Lambdin to straighten their grievances out and to "put it in writing," as well as his action on the morning of the election in signing a contract with individual employees, constituted "a promise and a grant of economic benefits in return for the employees' renunciation of the Union at the polls," in further violation of Section 8(a)(1) of the Act (R. 136–137). The Board also found that petitioner refused to recognize and bargain with the Union upon its requests on April 13 and 25 in violation of Section 8(a)(5) of the Act (R. 137–140).

B. THE BOARD'S ORDER

The Board's order requires petitioner to cease and desist from the unfair labor practices found, from interfering in any manner with the exercise of rights guaranteed employees under Section 7 of the Act, and from giving effect to the aforesaid contract of employment with individual employees (R. 140–141).

The order further requires petitioner to bargain with the Union upon request, to post appropriate notices, and to give separate written notice to each of the employees who signed the individual contract of employment that such contract will not be enforced, but without prejudice to the assertion of any legal rights acquired thereunder (R. 141–142).

C. THE DECISION OF THE COURT OF APPEALS

The court below, in a *per curiam* opinion, upheld the Board's decision as adequately supported by the record and enforced its order in full (Pet. 25).

ARGUMENT

1. An employer, prompted by a good faith doubt of the majority status of a union demanding recognition as the bargaining representative of his employees, may decline to bargain with it and insist that the union first establish its status in a Board election even though in fact it may have such status. However, where pending the election the employer engages in unfair labor practices to undermine the union, the Board may, as in the instant case, draw the inference that the prior refusal to recognize or bargain with the union was in fact prompted not by a good faith doubt of its majority status but by a desire to destroy its representative status, and hence was violative of the Act. E.g., *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 741 (C.A.D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Pyne Molding Corp.,* 226 F. 2d 818, 821 (C.A. 2); *National Labor Relations Board* v. *Stewart,* 207 F. 2d 8, 13 (C.A. 5).

Petitioner does not, apparently, challenge the foregoing principles. Its chief complaint is that (Pet. 9–13) there is no evidentiary basis in the record for finding that it ever refused to bargain with the Union, and hence there was no occasion for the Board to look to the other unfair labor practices bearing upon petitioner's good faith or lack of it. The issue thus narrows down to whether or not the Board's finding that petitioner did in fact refuse to bargain with the Union upon the latter's request is supported by substantial evidence on the record as a whole. The resolution of that issue adversely to petitioner plainly presents no question warranting further review by this Court. In any event, the record adequately supports the Board's findings in this respect. As the Board found (R. 139), when the Union requested petitioner to bargain with it, petitioner countered with a demand that the Union first disclose its bargaining demands and at the same time reserved to itself the right to question the Union's representative status after such disclosure had been made (*supra*, p. 4). Viewed in the light of petitioner's hostile attitude towards the Union, the Board could properly conclude, as it did, that petitioner's equivocal response was intended to be a rejection of the Union's demand for recognition and bargaining.

Alternatively, petitioner asserts (Pet. 12–13) that, if it engaged in any unlawful conduct prior to the election, the Union waived it when it consented to the election, and hence it could not be heard to complain that petitioner's misconduct brought about the Un-

ion's defeat at the election. But here, unlike the situation in *Aiello Dairy Farms*, 110 NLRB 1365, cited by petitioner, it was not until after the election that the Union first heard of the contracts which petitioner had entered into with the individual employees which conclusively revealed petitioner's bad faith in dealing with the Union. In such circumstances, there is no basis for invoking any doctrine of waiver. Cf. *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482; *National Labor Relations Board* v. *T. W. Phillips Gas & Oil Co.*, 141 F. 2d 304, 305–306 (C.A. 3); *Warehousemen's Union, Local 117, Teamsters* v. *National Labor Relations Board*, 121 F. 2d 84, 92–94 (C.A. D.C.), certiorari denied, 314 U.S. 674.[3]

2. Petitioner also asserts (Pet. 14–18) that the Board's order requiring it to bargain with the Union is improper because, first, it fails to give consideration to the employees' present wishes as to their choice of bargaining representative and, secondly, it is too indefinite since it fails to specify the period of time during which petitioner is obligated to bargain with the Union. The short answer to these contentions is that this Court has repeatedly upheld the

[3] Petitioner also suggests (Pet. 13) that the Board's findings that it engaged in acts of interference and restraint violative of Section 8(a)(1), on the basis of which the Board inferred petitioner's bad faith in refusing to bargain with the Union, either lack support in the record, or rest on privileged speech. As summarized above, *supra*, pp. 3–5, petitioner threatened employees with loss of employment for joining the Union and promised to take care of their "gripes" if they repudiated it at the election. Such threats of reprisal and promise of benefits constitute obvious violations of the Act.

Board's power to prescribe such remedial action in cases of this type. *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 687; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 705; *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112. As the cases make clear, petitioner is required to bargain with the Union in good faith for a reasonable period of time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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